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No. 79-678

IN THE
Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

BRIEF OF APPELLANT

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No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,

Appellant,

v.

CITY OF SAN DIEGO,*

Appellees.

QUESTIONS PRESENTED

1. Do the Fifth and Fourteenth Amendments prohibit the state of California from denying the constitutionally mandated remedy of just compensation to a property owner for oppressive regulatory actions conceded to constitute a "taking" in the constitutional sense?

2. Does it violate the Fifth and Fourteenth Amendments for the state courts of California to provide that invalidation is the only remedy available to a property owner which has been denied all use of its property and the regulatory conduct complained of is not a single act, but a continuing course of conduct?

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* The complaint named as defendants, in addition to the City of San Diego, the Mayor of the City of San Diego, Pete Wilson, the members of the City Council of San Diego, F. Gilbert Johnson, Maureen O'Connor, Lee Hubbard, Leon L. Williams, Floyd L. Morrow, Jim Bates, Robert Martinet, James Ellis and the Planning Director of the City of San Diego, James L. Goff.

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BRIEF OF APPELLANT

THE OPINIONS BELOW

San Diego County Superior Court, following a full trial, entered judgment on October 8, 1976, (Jt. App. 44)[1] awarding money damages to San Diego Gas & Electric Company

[1] References to the Appendix to the Jurisdictional Statement will be hereinafter cited as "J.S. App." References to the Joint Appendix will be hereinafter cited as "Jt. App."

("Property Owner") for the taking of its property by the City of San Diego ("City").[2]

On June 13, 1978, the California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of the trial court, finding that a "taking" had occurred and that Property Owner was entitled to monetary damages. The opinion was originally reported at 81 Cal.App.3d 844, 146 Cal.Rptr. 103.[3] (Jt. App. 48.)

The City appealed and the California Supreme Court granted a hearing on July 13, 1978 (J.S. App. D). After maintaining the matter on its docket without scheduling oral argument for almost one year, on June 14, 1979 the California Supreme Court transferred the case back to the Court of Appeal (J.S. App. E), to be reconsidered in light of its recent decision in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). (J.S. App. F.)

The California Court of Appeal, without permitting additional briefing or oral argument by the parties, issued an unpublished opinion on June 26, 1979. The court, in contradiction to its previous opinion on the identical record, reversed the judgment of the trial court, finding that even if Property Owner had been denied all use of its land, it was not entitled to compensation because under the mandate of the *Agins* case, a

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[2] The trial below was bifurcated at the defendants' request. The issue of liability was tried to the court, following which the court entered Findings of Fact and Conclusions of Law (Jt. App. 42) finding that a "taking" had occurred. The issue of damages was tried to a jury.

[3] When the California Supreme Court granted a hearing, the opinion of the court of appeal was "superseded" pursuant to the California Rule of Court 976 and is no longer deemed published.

party's sole remedy is to seek invalidation of the challenged regulations (Jt. App. 63).

Property Owner's petition for rehearing to the California Court of Appeal was denied (J.S. App. H), as was its petition for hearing to the California Supreme Court (J.S. App. I).

JURISDICTION

The California Court of Appeal, Fourth Appellate District, Division One, denied Property Owner's petition for rehearing on July 9, 1979. The California Supreme Court denied Property Owner's timely petition for hearing on August 22, 1979. Notice of Appeal to this Court was timely filed on October 3, 1979. The Jurisdictional Statement was filed on October 26, 1979.

This Court on June 16, 1980, postponed consideration of the question of jurisdiction until the hearing of the case on the merits. On July 11, 1980 the Clerk of the Court extended Appellant's time to file its brief on the merits to August 22, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), or alternatively, under 28 U.S.C. § 2103.

Property Owner has challenged the regulatory actions of the City of San Diego on the ground that the effect of those actions has been to deny Property Owner all use of its land, thereby "taking" its property which requires payment of monetary compensation under the Fifth and Fourteenth Amendments to the United States Constitution. The decision of the state court which is challenged herein was that regulatory (police power) actions, even those which have the effect of denying a

landowner all use of its property can *never* amount a "taking" and thus a property owner is *never* entitled to bring an inverse condemnation action to require the payment of monetary compensation for such actions.

Cases sustaining jurisdiction of an appeal to this Court from a state court judgment on the issue of whether the regulatory actions of a governmental entity have amounted to a "taking" of private property and whether the property owner is thus entitled to monetary compensation for these activities are the following: *Agins v. City of Tiburon,* ____ U.S. ____, 100 S.Ct. 2138 (1980); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Penn Central Transportation Co.,* 438 U.S. 104 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

> "nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "No state shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The resolution of public convenience and necessity authorizing the acquisition of open space land for park use, including the subject property, is set forth in Resolution No. 207761 (J.S. App. K-8).

The adoption of the open space element of the City of San Diego's General Plan classifying the subject property as open space is set forth in Resolution No. 208180 (J.S. App. K-10).

The rezoning of a portion of the subject property is set forth in City Ordinance No. 11088 (J.S. App. K-12).

STATEMENT OF THE CASE

In 1966, Property Owner, the San Diego Gas & Electric Company, assembled a 412-acre parcel of property in an area in the northern part of the City of San Diego known as the Sorrento Valley. The land that is the subject of this suit is approximately 206 acres of this parcel and includes 25 acres purchased from the City. Property Owner paid almost $2 million dollars to acquire the subject land.

The land was then (and is now) unoccupied except for utility lines. The land is in a relatively flat area at low elevation. A portion of it is subject to tidal action from the Pacific Ocean and other portions subject to "ponding" or standing water, due to poor drainage. The entire parcel has only sparse vegetation due to the soil's high salt content.

Property Owner purchased the property as a future site for a power plant facility. Property Owner at the time of the acquisition undertook careful and detailed investigation to assure that its intended industrial use of the property would be feasible. It consulted with the City as to its plan to hold the land for proposed future construction of a power plant, as well as negotiating directly with the City when it purchased, at fair market value, 25 acres of the subject land from the City.

At the time of acquisition the bulk (approximately 120 acres) of the subject land was zoned M-I-A (industrial) and the rest primarily A-1-1 (agricultural or holding zone).

The General Plan of the City of San Diego adopted in 1967 designated most of the subject property for industrial use and the remainder as an area for "future growth." "The City of San Diego General Plan - 1990," adopted by the City Council on January 27, 1972, designated the area where the subject property is located as an area intended for industrial use.

A January 1972 report prepared by the City, "San Diego Industry 1969-1990, A Planning Analysis," identified the Sorrento Valley as one of the most desirable areas of the city for industrial expansion.

The Sorrento Valley area from 1966 on was the location of considerable industrial development and is at present, except for the subject property, substantially filled out with industrial development.

Early in 1972, as the City undertook the formulation of its open space plan to meet state statutory requirements,[4] changes affecting the subject land began to occur.

The identification of the land to be included within the "open space" element of the City's General Plan, to meet the state requirement, and the development of a schedule identifying land that could be rezoned to preserve its open space character was

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[4] The California legislature through Government Code § 65700 required all cities to adopt a general plan which contained an open space element, as provided by Government Code § 65300 and § 65560 *et seq.* J.S. App. K-5, 6, 7. See also Jt. App. 157.

assigned by the City Council to its Planning Department. The task of identifying "open space" land for park reserve areas, land which was to be acquired through direct acquisition and the development of funds to secure such land was a task delegated by the City to its Community Development Department.

At a March 16, 1972 meeting, the City Council directed the Planning Director to proceed with a schedule of the potential open space areas that could be rezoned (Jt. App. 164). On August 10, 1972 rezoning (from industrial to agricultural) was initiated on a portion of the subject land. On April 11, 1973, the Planning Commission held a public hearing on the rezoning of the subject property. At that meeting it recommended that approximately 39 acres be "down-zoned" from its existing industrial zoning classification (M-1-A) to an agricultural zone classification. A substantial portion (approximately 77 acres) remained zoned as industrial and another segment (approximately 50 acres) remained zoned as future industrial use, contingent upon submission of a specific plan. This recommendation was subsequently presented to the City Council on June 7, 1973 and adopted (Ordinance No. 11088, J.S. App. K-12).

In the other arena, during 1972 and 1973, the Community Development Department continued with its task of selecting and determining the cost of, and the financing of, the acquisition of "open space" land, primarily directing its efforts toward an "open space" bond issue on the September 1973 ballot. With this goal in mind, the Community Development Department in 1973 prepared a staff report entitled "Park Reserve Systems, April 29, 1973" in which substantially all of

the subject property (over 200 acres) was identified as an area designated for acquisition as "open space" land. The report estimated the acquisition cost of 120 acres of the subject land at that time would be approximately $900,000.

On April 17, 1973, the City Council adopted a resolution of public convenience and necessity (Resolution No. 207761, App. K-8) and proposed a $22.5 million bond issue for the acquisition of open space for park reserve areas, to be approved at the September 1973 municipal election. Maps prepared for the election identified the subject property as land to be acquired.

In May of 1973 the Planning Department was scheduled to hold a public hearing on the open space element to the City General Plan which it had prepared at the request of the City Council. The plan presented was entitled "A Plan for the Preservation of National Parks for San Diego."

Consistent with the Planning Department's earlier April 1973 rezoning recommendation down-zoning 39 acres of the subject property to agricultural (which recommendation would be presented to and adopted by the City in June), the plan designated a portion of the subject property (approximately 39 acres) as "open space." The maps prepared for the public presentation identified 39 acres of the subject land as "open space."

Because of a notice problem, it was necessary to continue the scheduled May 16 meeting. However, in preparing for the meeting, the Planning Department and the Community Development Department realized that the plans prepared by the two departments did not conform as to the areas designated

as "open space." (The Community Development Department had designated over 200 acres of the subject land as open space and identified it as land to be purchased through the bond issue. The Planning Department only designated 39 acres of the subject land as open space and had recommended down-zoning to agricultural).

Since the Planning Department had in the past been instructed to conform its efforts to those of the Community Development Department, the revisions to coordinate the respective plans resulted in the inclusion of over 200 acres of property owner's land, instead of 39 acres, under the "open space" designation of the City's General Plan.

When the continued hearing was held on May 23, 1973, the maps contained in the report, which were submitted to the public, still erroneously reflected the earlier plan, *i.e.,* 39 acres were designated as open space. No announcement of the alteration was made. Property Owner was unaware that a change had been made or of the impact of that change on its property. The revised open space plan designating over 200 acres, instead of the 39 acres, of Property Owner's land as "open space" was adopted by the Planning Commission.

The new open space element of the City of San Diego's General Plan was presented to the City Council on June 19, 1973. The maps that were distributed to each member of the Council and the members of the public similarly contained the erroneous designation of the area to be included in the open space area, although the large scale wall maps had been corrected. No mention of the discrepancy was made on the public record. The open space plan was adopted as presented. The result was that over 200 acres of Property Owner's land was

designated as open space, even though only a few days earlier (on June 7) the City Council had reviewed and accepted the rezoning recommendation of the Planning Commission which had down-zoned 39 acres of the same land to agricultural but had retained most of the subject land within the industrial use zoning designation.

The open space bond issue presented at the September 1973 election, which identified the 200 plus acres as land to be acquired for open space and park reserve, failed.

Following the failure of the 1973 bond issue, the City deleted the subject property from its list of properties proposed for open space acquisitions.

Property Owner thus held over 200 acres of land which it had purchased, some from the City itself, for industrial use. It had discussed its intended use with the City. Its intended use was permitted at the time of acquisition and was consistent with the designated long range intended future use for the area, according to the General Plan of the City as well as other planning guides. Now, however, the parcel was classified as an "open space" area.[5] The City had down-zoned a portion of the

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[5] The definition of open space under the San Diego General Plan is:

> "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes."

The Municipal Code of the City (§ 61.0601) defines open space as:

(Footnote continued on page 11)

subject land to agricultural, preventing industrial use. While some of the parcel remained zoned for industrial use, due to its designation as "open space" land, no industrial use was possible. Furthermore, because of the unique characteristics and location of the land no use other than industrial was possible.

Property Owner, on August 15, 1974, filed suit against the City, the City Council, and the Planning Director alleging that the effect of the regulatory actions of the City on its property amounted to a "taking" of its land entitling Property Owner to compensation (Complaint, Jt. App. 4). The defendants were successful in their demurrer to Property Owner's cause of action requesting mandamus relief to set aside the zoning actions. Property Owner amended the complaint to seek declaratory relief (Jt. App. 32).

At the liability phase of the trial, tried to the court, Property Owner presented evidence which established that the actions of the City had resulted in a "taking" of its land: Property Owner

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(Footnote 5 continued)

> "any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which, in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for The City of San Diego" as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources."

established that the subject property was the product of a unique, carefully planned assemblage of real estate,[6] tacitly approved by the City.[7] The use (industrial) planned by the Property Owner was permitted and feasible at the time of acquisition[8] and was to be the intended use for the area for the foreseeable future.[9]

Property Owner established that at the culmination of City's actions all use of the land was now precluded: Expert testimony established that industrial use was the best, and indeed only feasible use, for the property[10] and that after the City's actions, including the classification of the land as open space, no industrial use was possible.[11] Furthermore, because of the unique physical characteristics of the property, no other

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6 Mr. DeVore of San Diego Gas & Electric Company testified that the parcel was carefully selected and acquired as a site for a future power plant facility. Jt. App. 69 [R.T. 3, 4, 7-12].

7 Jt. App. 70 [R.T. 9].

8 The City's General Plan in 1967 identified the area as intended for industrial use and future growth (J.S. App. A-3) and the bulk of the land was zoned for industrial use (J.S. App. A-3). See also Jt. App. 70 [R.T. 7-8].

9 The future planning instruments of the City - its General Plan and a study regarding future industrial areas - identified this area as intended for industrial use, at present and in future.

10 Mr. William Rick, an expert in land use planning and a civil engineer, testified that his feasibility study determined that industrial development was the only economically feasible use of the land. Jt. App. 110 [R.T. 123-137].

11 Testimony of Mr. DeVore, Jt. App. 80 [R.T. 47-48]; testimony of Mr. Worley, Jt. App. 85 [R.T. 95-96]; and testimony of Mr. Rick, Jt. App. 111 [R.T. 143-144].

practical or economic uses existed. No practical or economic agricultural use was possible, not even low density grazing.[12] No commercial use was possible.[13] No residential use was possible.[14] In its "after condition" the subject property had no practical, beneficial, or economic use,[15] and was unmarketable.[16]

Property Owner also demonstrated that the City of San Diego had a policy of requiring consistency between the actual use and development of land, and the open space designation of the General Plan (Jt. App. 159). Property Owner demonstrated that an industrial use was not consistent with the City's definition of open space.[17] The Planning Director of the City testified that in his opinion any industrial use would require a subdivision of the property and that thereby the requirement for consistency would be raised. He further

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12 Mr. A. Lee Griner, an expert agronomist, testified that the property could not be used for any agricultural purpose and would not support even low density grazing. Jt. App. 99 [R.T. 108-115] See also Jt. App. 96 [R.T. 126-127].

13 Testimony of Mr. Rick, Jt. App. 103 [R.T. 126-129].

14 Testimony of Mr. Rick, Jt. App. 104 [R.T. 126-129].

15 Testimony of Mr. DeVore, Jt. App. 81 [R.T. 58-59]; testimony of Mr. Rick, Jt. App. 111 [R.T. 129-130, 143-144].

16 Mr. Joseph Gallagher, an expert real estate appraiser, testified that subsequent to the open space designation there was no private use possible and the property was unmarketable. Jt. App. 125 [R.T. 272-273].

Mr. Frank DeVore confirmed this and testified that in his opinion after June 19, 1973, the property was, for all practical effect, devoted to public use as open space. Jt. App. 82 [R.T. 59].

17 See City's definitions of open space in n. 5, *supra*. *See also* Jt. App. 157 [R.T. 95-96, 201-202, 360-370].

testified that he did not know of an industrial use that would be consistent with open space.[18]

The trial court, based on this evidence, made the following Findings of Fact:

> "The continuing course of conduct of the defendant City culminating in June of 1973, and, in particular, the designation of substantially all of the subject property as open space . . . [deprived plaintiff] of all practical, beneficial or economic use of the property. . . ." (Finding of Fact 29)
>
> "No development could proceed on the property designated as open space unless it was consistent with open space. In light of the particular characteristics of the said property, there exists no practical, beneficial or economic use of the said property designated as open space which is consistent with open space." (Finding of Fact 30)
>
> "Following the actions of the defendant City in June of 1973, it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space or the remainder of the subject property." (Finding of Fact 32)
>
> "[T]he property . . . is unmarketable. . . ." (Finding of Fact 33)
>
> (Jt. App. 41)

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18 Testimony of Mr. Goff, Jt. App. 143 [R.T. 361-373].

The trial court, based on these findings, concluded as a matter of law that:

> "The actions of [the] City . . . deprive[d] plaintiff of any practical, beneficial or economic use of the property designated as open space, and, therefore, taken as a whole, constitute a taking of plaintiff's property . . . without due process of law and just compensation within the meaning of the California and United States constitutions. . . . Plaintiff is entitled to judgment against defendant City of San Diego for money damages in an amount to be determined by the fair market value of the property. . . ."
>
> (Jt. App. 42)

The City appealed. The California Court of Appeal affirmed the judgment, specifically rejecting the City's arguments that the regulatory actions cannot give rise to an inverse condemnation cause of action, that money damages could not be awarded, or that administrative remedies had not been exhausted (Jt. App. 48), among numerous other issues.

The City petitioned the California Supreme Court to review the case and although review was granted the case was never heard by the California Supreme Court. The California Supreme Court on March 14, 1979 in the case of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979) announced:

> "a local entity's exercise of its police power, which may exceed constitutional limits is [not] the equivalent to a lawful taking of property . . . thereby necessitating payment of compensation. . . . We . . . believ[e] the preferable view to

> be that . . . such governmental action . . . is invalid . . . [and] remedy by way of damages . . . is not thereby made available."
>
> (J.S. App. F-6)

Following the *Agins* decision, the California Supreme Court transferred the instant case back to the Court of Appeal to be "reconsidered" in light of *Agins* (J.S. App. E-1).

Without permitting additional briefing or oral argument, the Court of Appeal now reversed the decision of the trial court (and its own earlier affirmance), finding under the teachings of *Agins*:

> "[T]he individual who is deprived of his property due to the state's exercise of its police power is not entitled to compensation. . . . [nor] to a cause of action in inverse condemnation."
>
> "A local entity's arbitrary unconstitutional exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation; rather the party's remedy is administrative mandamus."
>
> (Jt. App. 66)

SUMMARY OF ARGUMENT

The precedents of this Court clearly establish that a course of regulatory conduct can result in a "taking" of private property and that a governmental body cannot escape or avoid the constitutional imperative of just compensation merely because its actions were taken in pursuit of the public welfare.

Whether a "taking" has occurred in a particular case is determined from the effect of the actions on the property, particularly the economic impact of the regulations, the frustration of the owners' investment-backed expectations, as well as a balancing of the public need versus the private property owner's burden.

The trial court found in this case, following a full evidentiary hearing, that the effect of the regulatory actions was to deny the owner all practical, economic or beneficial use of its land, frustrate its investment-backed expectations, and that the regulations had gone too far and were too great a burden to ask one individual property owner to bear.

Although the Court of Appeal did not dispute this finding, it concluded based on the rationale expressed by the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979) that regulatory actions can *never* give rise to an inverse condemnation cause of action or a suit for damages.

This conclusion, that regulatory actions can never result in a "taking" and thus can never give rise to a suit for damages, but only invalidation, is contrary to settled law favoring the award of damages as "just compensation" for the taking of private property. Invalidation provides no just compensation to property owner in this case and as a matter of public policy is not a desirable remedy.

ARGUMENT

I

A COURSE OF REGULATORY CONDUCT WHICH PRECLUDES ALL PRACTICAL, BENEFICIAL OR ECONOMIC USE OF PRIVATE PROPERTY IS A TAKING.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation."

The "taking" allegation, in the instant case, arises in the context of what is commonly referred to as "inverse condemnation," which as this Court only recently noted is merely a "shorthand description" of the method under which a landowner is entitled to bring an action against the government, because the constitutional compensation provision is of a "self-executing character," and to recover "just compensation", *i.e.*, "'to recover the value of property which has been taken . . . even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *United States v. Clarke*, ____ U.S. ____, 100 S.Ct. 1127, 1129 (1980) (citation omitted).

The determination of which actions of a governmental entity amount to a "taking" of property thus entitling the property owner to bring his suit to recover "just compensation" has proven to be a problem of "considerable difficulty" (*Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978)), and one for which this Court has indicated it has been unable to develop any "set formula" (*id.*), thereby necessitating an examination of the particular circumstances in each individual case (*Id.* at 124). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

However, the guidelines established by this Court in previous cases dealing with the question of "takings" when applied to this case demonstrate unquestionably that a taking has occurred.

This Court long ago rejected the simplistic notion that a "taking" of property only occurs when there has been an actual physical seizure or invasion of private property and has instead held that the appropriate inquiry to be made when seeking to determine whether a taking has occurred is whether property rights have been destroyed by the governmental acts; *i.e.*, has there been a deprivation of one of the "essential sticks in the bundle of [property] rights . . ." *Kaiser Aetna, supra,* 444 U.S. at 176.

The desire to preserve open space on the theory that it is a physical, social, aesthetic, economic and ecological asset is not an impermissible goal or objective of governmental action in the pursuit of the public welfare and the common good, (*Berman v. Parker,* 348 U.S. 26 (1954)), and appellant does not so claim. One of the premises challenged in the instant case is the theory that the governmental agency can escape or avoid the constitutional imperative of just compensation merely because its actions were taken in pursuit of the public welfare. On many previous occasions this Court has recognized that merely because actions are taken pursuant to the "police power," they are not thereby immunized from the explicit restrictions of the Fifth Amendment:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . ."
>
> *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

Previous attempts to isolate and sever the exercise of the police power from the constitutional consequences of "taking," have been flatly rejected. *See Penn Central, supra,* 438 U.S. at 122 n. 25.

> "[W]e have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking."
>
> *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 168 (1958).

In determining whether a taking has occurred, this Court has looked not to the name given to the actions by the governmental entity but to the *effect* of those actions.

> "The incantation pronounced at the time [of the government's action] is not of controlling importance; our primary concern is with the accomplishment."
>
> *Davis v. Newton Coal Co.,* 267 U.S. 292, 301 (1925).

Again, in *Hughes v. Washington*, 389 U.S. 290, 298 (1967) this Court stressed,

> "The Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does."

This Court only recently reaffirmed the validity of this rule when it observed that regulatory actions such as zoning can result in a "taking" of the property:

> "The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land. . . ."
>
> *Agins v. City of Tiburon*, ____ U.S. ____, 100 S.Ct. 2138, 2141 (1980).

Having clearly established that regulatory actions can result in a "taking," the next task is to determine if a taking has, in fact, occurred under the facts of this case.

This Court has identified certain criteria which have "particular significance" in determining when, "justice and fairness" require that the "injuries caused by public action be compensated by the government." *Kaiser Aetna, supra,* 444 U.S. at 175 (1979); *Penn Central, supra,* 438 U.S. at 124. See also *Pruneyard Shopping Center v. Robins,* ____ U.S. ____, 100 S.Ct. 2035 (1980):

1. *Is a valuable private property right entitled to constitutional protection being asserted*? The Court has indicated that while the concept of "property" in the Fifth Amendment is designed to protect the full range of interests that citizens possess, (*United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)) some regulation and infringement on some rights must be tolerated by each citizen for "some values are enjoyed under an implied limitation." *Pennsylvania Coal Co., supra,* 260 U.S. at 413. Moreover not all economic interests are property rights, but only those which have the law back of them, so that courts can compel compensation for their invasion. *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945). *See*

Kaiser Aetna, supra, 444 U.S. at 178, 180; *Penn Central, supra,* 438 U.S. at 125, 130.

2. *What has been the economic impact of the regulations on the owner*? The real world economic effect of the regulations, *i.e.*, "the economic impact of the regulation on the claimant," (*Penn Central, supra,* 438 U.S. at 124; *Kaiser Aetna, supra,* 444 U.S. at 175) is particularly relevant and must be considered. The Court has held that a taking has occurred if the owner, as a result of the regulations, has been denied the "economically viable use of his land" (*Agins, supra,* 100 S.Ct. at 2141).

Such an examination looks to the challenged regulations and their demonstrable effect on both the property and owner, both in terms of "severity" and "magnitude." *Penn Central, supra,* 438 U.S. at 131. See also *Virginia Surface Mining and Reclamation Assoc. v. Andrus,* 483 F.Supp. 425, 440 (W.D.Va. 1980), appeal docketed, No. 79-1538 (April 1, 1980).

3. *Has there been an interference with or frustration of the owner's investment-backed expectations*? Having examined the property right asserted, the degree to which the regulations have economically impacted that property right, the Court has also indicated that a key factor in determining whether a "taking" has occurred is to look at this particular property owner's subjective expectations - What were the owner's legitimate, reasonable, and investment-backed expectations as to this property right in question and have they been frustrated? Such an inquiry focuses on the permissible uses prior to and after the challenged regulations, the property owner's demonstrable expectations as to the use of the property and the financial

expenditures undertaken in expectation of fulfillment of that expected use. See, generally, *Kaiser Aetna, supra,* 444 U.S. at 175-176; *Penn Central, supra,* 438 U.S. 104.

4. *Is the burden placed on the property owner too great despite the public benefit?* This overlapping inquiry, involves a weighing and balancing of the competing interests between the needs of society and the legitimate expectations of the property owner. *Agins, supra,* ____ U.S. ____, 100 S.Ct. at 2142.

This Court has held that regulations that go "too far" in the burden they ask the property owner to bear, that place "an unduly harsh impact upon the owner's use" or cause a frustration of "distinct investment-backed expectation" can amount to a "taking," particularly when the challenged governmental actions are designed to "facilitate uniquely public functions." *Penn Central, supra,* 438 U.S. at 127-28.

II

PROPERTY OWNER PROVED AT TRIAL THAT THE EFFECT OF THE REGULATORY ACTIONS OF CITY WAS A "TAKING" OF ITS PRIVATE PROPERTY

Utilization and application of these "particularly significant" criteria to this case demonstrate that the regulatory actions of City did effect a "taking" of private property.

A. Property Owner's Valuable Property Rights, Entitled To Constitutional Protection, Have Been Violated.

The "bundle" of rights of which property consists is entitled to constitutional protection, as this Court has long recognized. When regulations have deprived the owner of one of the "essential sticks in the bundle of [property] rights," and have extinguished a fundamental attribute of ownership, a taking has occurred. *Kaiser Aetna, supra,* 444 U.S. at 176.

> "The right of a person to own land and the protection of that right were sacred tenets of the common law; and it is no less sacred today as the population booms. We are aware [that there is only] so much land; that each parcel is considered unique; therefore, as the desire for land increases and the parcels of ownership become smaller and smaller the importance of the Fifth Amendment increases rather than diminishes.
>
> *Virginia Surface Mining and Reclamation Assoc. v. Andrus,* 483 F.Supp. 425 (W.D.Va. 1980).

Property rights "denote the group of rights inhering in the citizens' relation to the physical thing, such as the right to possess, *use and dispose of it.*" *United States v. General Motors Corp.,* 323 U.S. 373, 377 (1945) (emphasis added).

The right to a reasonable economic use, the right to develop, is one of *the* fundamental aspects of the right of private property ownership.

When the result of the governmental actions is to "take away the use and value" of the property, the result is effectively the

appropriation of the title to the property. *United States v. Lynah,* 188 U.S. 445, 470 (1903).

> "Property is taken in the constitutional sense when inroads are made into the owner's use of it. . . ."
>
> *United States v. Dickinson,* 331 U.S. 745, 748 (1947).

As the facts of this case so vividly demonstrate, Property Owner in this case cannot use its property either for its intended purpose or for any other economic use. Property Owner holds 200 plus acres of land, purchased for almost $2 million, which is now unmarketable. It holds land which now has no practical or economic use. The only use for the land is the public use of open space park reserve.

As Justice Clark noted, dissenting in *Agins v. City of Tiburon, supra,* 24 Cal.3d at 282,

> "Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation."

In *Kaiser Aetna, supra,* 444 U.S. at 176, this Court found that the invasion, frustration, or destruction of one of the essential sticks in the bundle of rights (there "the right to exclude") that are commonly characterized as property is a "taking."

Here there has been the total destruction of the fundamental attributes of private property ownership -- the right to a reasonable economic use has been denied, the right to develop has

been denied, the right to own property that has some economic value has been denied, so that it cannot even be marketed and sold -- the actions of the government have effected a taking.

B. The Economic Impact Of The Regulatory Actions Was To Render The Property Practically And Economically Useless.

Based on the evidence presented by Property Owner in the instant case the trial court found:

1. The land was acquired by Property Owner for future industrial use. (Finding of Fact 3)
2. At the time of acquisition the property was designated for industrial use by its specific zoning designation and in more general planning documents. (Finding of Fact 6, 7)
3. Prior to June of 1973 the property could be used for an industrial park. (Finding of Fact 27)
4. The course of conduct by the City, down-zoning some of the property from industrial to agricultural, identifying the property as "open space" land to be acquired by condemnation but later abandoning those efforts, identifying the land as "open-space" under the General Plan of the City, resulted in the deprivation of all practical, beneficial or economic use of the land. (Findings of Fact 12, 14, 15, 16, 17, 22, 23, 25, 26, 29)
5. No use or development (industrial or otherwise) consistent with the open space designation exists for this particular property. (Finding of Fact 30)
6. The property is unmarketable. (Finding of Fact 33)

Property Owner purchased the subject property for a purpose that was reasonable and permissible at the time of acquisition and well into the future. It paid fair market value for the property based upon the authorized industrial use. Following the actions of the City, Property Owner holds title to land which it can no longer use as intended nor make any other economic use of the land -- no industrial development is possible, no commercial development is possible, no agricultural use is possible, no residential use is possible, and the property is totally unmarketable.

The impact of and the effect of the regulatory actions of the City of San Diego on the subject land has not only caused a substantial devaluation of the property (*Kaiser Aetna, supra,* 444 U.S. at 180) but has completely destroyed the "economically viable use" of the land (*Agins, supra,* 100 S.Ct. at 2141).

C. The Regulatory Actions Have Destroyed The Reasonable Investment-Backed Expectations Of Property Owner.

Property Owner presented evidence that the subject property was the product of a unique, carefully planned assemblage of land designed for Property Owner's special needs and particularly suited for that purpose -- a site for future construction of a power plant. Moreover, because of the amount of land that was needed and the time, expense, complexity, and effort required to assemble such a parcel, this was an acquisition that was undertaken only after careful investigation, research, and preparation.

The intended industrial use was permissible at the time of acquisition and from all indications was to be the use permitted long into the future. All surrounding development and use was industrial, the zoning was industrial, and the future projections by the City for the area indicated future industrial use. Property Owner consulted and discussed with the City its intended industrial use for the parcel, and negotiated directly with the City in regard to the parcel when the City sold to Property Owner 25 of the acres it needed to assemble the parcel. Property Owner submits that its careful investigation and planning, and discussion with the appropriate authorities regarding its intended use amounting to tacit approval, resulted in the formation of sufficiently important expectations as to the use of the property so that the government should not be allowed to frustrate those expectancies without paying compensation to the owner. *Kaiser Aetna, supra,* 444 U.S. at 179.

Following the regulatory actions challenged here, the rezoning of the property, the abandoned overtures to purchase or condemn the property, the inclusion of the property in the open space element of the General Plan, and the resulting impossibility of using the property for its intended industrial use or any other use or even sale of property, the entire economic value of the property has been destroyed. Property Owner expended almost two million dollars to acquire land which is now useless and virtually worthless as private property. The only use remaining is the public use of an open space park reserve.[19] Such a total abrogation and frustration of a property

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[19] For all practical purposes, that has been its use for the last 7 years. The public purpose has been accomplished without payment of any compenstion--much less *just* compensation. See testimony of Mr. Frank DeVore. (Jt. App. 82)

owner's reasonable investment-backed expectations must be a "taking."

D. The Governmental Action In This Case Has Gone "Too Far" And Amounts To A Taking.

The balancing and weighing of competing interests supported by the teachings of this Court was in fact carefully carried out by the trial court on a fully developed record. That court concluded, as did Justice Holmes in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. at 415, that a regulation which goes too far must be recognized as a taking.[20]

The trial court found that Property Owner was left with land that was practically, beneficially, and economically useless. The only remaining use left for the land was as a public park, an "open space" area to be shared and enjoyed by the public as a whole. The trial court concluded that devotion of private land to such a uniquely public use, when balanced against the burden and cost it placed on Property Owner resulted in such actions being a "taking" of private property which under the Fifth Amendment required compensation.

Regulations, even those which further public goals or policies, nonetheless may go "too far," and when the effect is to cause an unduly harsh impact on the individual private property owner, frustrating the owner's legitimate economic

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[20] And, incidentally, the same analysis was carried out with equal care and attention to detail by the Court of Appeal, with the like result in its first opinion, affirming the judgment for money damages, before the California Supreme Court's *Agins* decision rendered such analysis moot in California.

expectations, then it is no longer "fair" that one individual owner should bear such a burden which should in "fairness and justice," because of the public benefit, be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40 (1960); *Pennsylvania Coal, supra,* 260 U.S. 393 (1922).

Such a conclusion is supported by the very purpose of the protection afforded by the Fifth Amendment which is

> "[to] redistribute certain economic losses inflicted by public improvement so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."
>
> *United States v. Willow River Power Co.,* 324 U.S. 499, 502 (1945).

III

THE JUDGMENT BELOW IS NOT PREMISED ON ADEQUATE STATE GROUNDS

The City has earlier suggested (Motion to Dismiss at 9) that the premise for the second decision by the Court of Appeal in the instant case, reversing the trial court, was the determination that Property Owner had failed to exhaust its administrative remedies and thus argues that the decision rests on adequate state grounds. The premise of the decision and the holding of the court below, now challenged before this Court, is abundantly clear:

> "the individual who is deprived of his property due to the state's exercise of the police power is not entitled to compensation. . . ."
>
> . . . .
>
> "[the] exercise of the police power which deprives the owner of the beneficial use of his land does not require compensation. . . ."
>
> . . . .
>
> "Even assuming no use is [possible] . . . [the] complaint deals with over-zealous use of the police power . . . [the] remedy is mandamus or declaratory relief, no[t] inverse condemnation"
>
> (Jt. App. 66).

The Court of Appeal did not dispute or challenge Property Owner's contention, and the trial court's determination following presentation of all the evidence, that the effect of the regulatory actions was to deprive Property Owner of all economic use of its property. What the Court of Appeal held was that such regulatory (police power) actions can *never* amount to a "taking" in the constitutional sense and can *never* give rise to an action to recover monetary compensation.

There is no independent or adequate state ground for such a holding. Such a position directly, flatly and blatantly contradicts and ignores the protections afforded by the Fifth Amendment as interpreted by this Court.

The exhaustion of administrative remedies is not[21] an issue that is before this Court not should it be addressed by the Court, for it was raised, addressed and properly resolved under existing California state law by the courts below.

Property Owner has consistently maintained that it was not required to exhaust administrative remedies, since no administrative remedy existed for this constitutional violation and further that to have attempted to pursue such an imagined remedy would have been a useless and futile act.

The trial court agreed and found, based on the evidence presented, that

> "it would have been totally impractical and futile for plaintiff to have applied to defendant City for the approval of any development of the property designated as open space. . . ."
>
> (Finding of Fact 32.) *See also,* Jt. App. 42 [R.T. 411-413].

In the "first appeal" to the state Court of Appeal the court specifically and at some length (Jt. App. 54) rejected City's contention that Property Owner had failed to exhaust its administrative remedies, finding that under existing California law there was no failure to exhaust (relying on *Sneed v. County*

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21 The notation by the court that Property Owner had not applied for a permit was not a ruling that there had been a failure to exhaust administrative remedies for the court in the very next sentence observed that it would have made no difference since the fact remained that Property Owner could never bring an inverse condemnation action.

of Riverside, 218 Cal.App.2d 205 (1963)[22] and in any event to have applied for any use or development permit or zoning change would have been a futile and useless act.

The court in reaching that decision noted that the definition of open space in the City of San Diego's General Plan was land that is "essentially open or natural . . . appreciable for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes." (Jt. App. 52.) The state court also noted that the trial court found based on the evidence presented at trial, that the City as a matter of policy required the use of land to be consistent with its open-space designation (Jt. App. 54) and that it was "inconceivable" that the City would permit an industrial use in an open space area (Jt. App. 55).

The Court of Appeal's resolution of the exhaustion question is correct under California law.

In *Ogo Associates v. City of Torrance,* 37 Cal.App.3d 830, 834 (1974) the Court recognized that the exhaustion doctrine is not an inflexible dogma, finding that "pursuit of futile administrative remedies in order to invoke the jurisdiction of the courts" is not necessary.

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22 In *Sneed* the California courts distinguished between cases where a property owner desires exemption from what existed before and other instances where the government by its regulatory action has "invaded the alleged property rights of plaintiff and in response plaintiff does not challenge the constitutionality of the ordinance but merely seeks damages in inverse condemnation. . . ." 218 Cal.App.2d at 212. See also *Ramos v. County of Madera,* 4 Cal.3d 685, 691 (1971) (The rule has no application where the remedy is unavailable or inadequate).

The *Ogo* court excused plaintiff from seeking a variance from the zoning ordinance since the evidence presented by the plaintiff demonstrated that it was "inconceivable," the variance would be granted and that to require them to do so would be "to require them to pump oil from a dry hole." *Ogo Associates, supra,* 37 Cal.App.3d at 834.

Only last year in *Furey v. City of Sacramento,* 24 Cal.3d 862 (1979) the California Supreme Court recognized a property owner's right to challenge a zoning ordinance without first applying for a variance since a review of the ordinance and the desired use revealed a fundamental incompatibility and it was clear that no other use would have been allowed. *Accord, Eldridge v. City of Palo Alto,* 57 Cal.App. 613, 632-633 (1976) (disapproved on other grounds in *Agins, supra,* 24 Cal.3d 266).[23]

If failure to exhaust available administrative remedies had been a "flaw" in Property Owner's case, the court would have so found in the "first appeal." The California Supreme Court, which requested the court to reconsider the instant case in light of *Agins* had stated, albeit in dictum, that challenges to regulatory actions do not give rise to an inverse condemnation action or entitle the owner to a damage remedy. The state Court of Appeal concluded, from its reading of *Agins* that regulatory "police power" actions can simply never give rise to inverse

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[23] As the court noted in *Dahl v. City of Palo Alto,* 372 F.Supp. 647, 649 (N.D.Cal. 1973) in responding to the claim that there had been a failure to exhaust administrative remedies by applying for a sue permit, "It is highly improbable a variance would . . . be granted where development would be completely contrary to the goal of preserving the land in its natural or near natural state."

condemnation action and the awarding of damages. On that basis, and that basis alone, the court reversed the judgment.

There is no adequate state ground for the decision. The decision below, based on the rationale expressed by the California Supreme Court in *Agins*, is in direct conflict with the mandate of the Fifth Amendment and as such raises a substantial federal question which must be resolved by this Court.

IV

MONEY DAMAGES, NOT INVALIDATION, PROVIDE "JUST COMPENSATION" IN TAKING CASES.

A. The Precedents Of This Court Uniformly Support The Award of Money Damages.

"Whether a State may limit the remedies available to a person whose land has been taken" to those of mandamus or a declaratory judgment, was an issue noted, but not considered by this Court only last term. (*Agins v. City of Tiburon, supra,* ____ U.S. ____, 100 S.Ct. at 2143.) The issue is squarely presented in this case.

In the instant case, following a full presentation of evidence, the trial court found that there had been a "taking" and that under the Constitution, Property Owner was entitled to monetary compensation.

After originally affirming the trial court in all respects the Court of Appeal reconsidered the case in light of the rationale expressed by the California Supreme Court in its *Agins,* opinion and concluded that challenges to regulatory actions never give rise to an inverse condemnation cause of action.

In *Agins*, the California Supreme Court in dictum, concluded:

> "The need for preserving a degree of freedom in the land use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuades us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief. . . ." 24 Cal.3d at 274, 276-277.

Premised on this, not surprisingly, the court below concluded that even though Property Owner had been denied all use of its land, "inverse condemnation" is not available as a cause of action to challenge the effect of the regulatory action and that money damages are not available.

The stunningly absolutist approach of the California Supreme Court in *Agins*, followed by the Court of Appeal in the instant case, finding the very remedy mandated by the language of the Fifth Amendment - compensation - as an "undesirable" and "inappropriate" remedy that is never available when the regulatory actions of a governmental body are challenged, even though there has been a denial of all use - a "taking" - is shocking and in flat contradiction to the mandate of the Fifth Amendment - private property shall not "be taken for public use, without *just compensation*."

The arguments previously advanced by the City and by numerous others in favor of the position advanced in *Agins*, all have their foundation in a concept rejected by this Court long ago. Reduced to its essence, the position is that regulatory "police power" actions can never effect a "taking" of private property.

See discussion above at 16-18. Realizing the problems of that argument, its proponents adopt a variation or fall-back position that even if it is assumed regulatory actions somehow amount to a "taking," nonetheless a "regulatory" taking is a different kind of "taking" than a "physical" taking and "just compensation" need only be paid when there is a physical taking of property. Property Owner submits that such a distinction is nothing more than another attempt to sever and isolate police power actions from the constitutional consequences of a taking and is a theory that is fundamentally at odds with the Fifth Amendment and the precedents of this Court interpreting the Fifth Amendment.

Since the focus of the Court in determining whether a "taking" has occurred does not distinguish between physical or non-physical interference, but whether there has been an interference with the fundamental attributes of property rights, there is no basis for arguing that the manner in which the taking is accomplished somehow determines and changes what remedy is available or what "just compensation" means.

The importance and availability of a damage award for the violation of constitutional rights has only last term been reaffirmed by this Court when it specifically and emphatically held that damage compensation is available and is to be awarded when constitutional rights are violated by cities, regardless of the good faith of the action taken. *Owen v. City of Independence,* ____ U.S. ____, 100 S.Ct. 1398 (1980).

The lower court here acknowledged that the trial court found the excessively burdensome regulations to be a violation of the constitutional rights guaranteed by the Fifth Amendment (Jt. App. ____) and yet denied the availability of the damage remedy in an inverse condemnation action.

This Court in *Owen* responded to the argument, similar in rationale to that advanced by the California Supreme Court in *Agins*, that the threat of damage awards would excessively burden the governmental process, by stating:

> "A damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficiency is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.
>
> . . . .
>
> To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre*."
>
> 100 S.Ct. at 1415, 1418.

While Property Owner acknowledges that this Court was addressing personal, rather than property, rights in finding a damage remedy available under 42 U.S.C. § 1983, this Court has previously noted that any supposed dichotomy between personal and property rights is a false one, for a "fundamental interdependence exists between [them]" and "[n]either would have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

That the inverse condemnation cause of action with its damage remedy is available to a property owner who alleges his property has been "taken" by the government was noted in *United States v. Clarke, supra,* ____ U.S. ____, 100 S.Ct. 1127.

There the court found that an "inverse condemnation" cause of action arises because the effect of governmental actions is "as if the government had taken his property under its sovereign right of eminent domain", ". . . even though no formal exercise of the power of eminent domain has been attempted. . . ." and gives rise to "a cause of action against a governmental defendant to recover the value of property which has been taken. . . ." *Clarke, supra,* ___ U.S. ___, 100 S.Ct. at 1129, n. 2, 1130.

The court in *Clarke* found that the right to "sue for damages" in inverse condemnation is based on the theory that the property owner is entitled to sue to "stop" the action or to waive that and demand money damages instead. *Clarke, supra,* ___ U.S. ___, 100 S.Ct. at 1129, n. 2, citing *United States v. Lynah,* 188 U.S. 445 (1903).

Previous decisions of this Court defining the concept of "just compensation" support the position that money damages are available as a remedy. This Court has stated that "just compensation" requires that the owner of taken property be compensated by receiving in return what is the equivalent of the taken property's value. *Danforth v. United States,* 308 U.S. 271, 283 (1939); *Olson v United States,* 292 U.S. 246, 255 (1934); ("the market value . . . paid in money"); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893). (". . . full and exact equivalent").

That a damage remedy has always been contemplated as a remedy available to the property owner whose land has been "taken" can be seen from a review of the language used by this Court throughout the years in its discussions of the remedy available to the property owner in a "taking" situation.

"[N]o private property shall be appropriated to public uses unless *a full and exact equivalent* for it be returned to the owner."

Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). (Emphasis added)

"[For] a taking and appropriation within the scope of the 5th Amendment to the Constitution . . . the government is *to pay the* value of the property so appropriated."

United States v. Lynah, 188 U.S. 445, 461 (1903) (Emphasis added)

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than *the constitutional way of paying for the change.*"

Pennsylvania Coal, supra, 260 U.S. at 425. (Emphasis added)

"[The property owner] is entitled to be put in as good a position *pecuniarily* as if his property had not been taken."

Olson v. United States, 292 U.S. 246, 255 (1934). (Emphasis added)

"[*P*]*aying* just compensation . . . through action of the owners in the courts."

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 291 (1958). (Emphasis added)

> "[Whether] the economic injuries caused by public action [are to] be compensated '[and require the government] *to pay* for any losses . . .' depends largely 'upon the particular circumstances [in that] case.'"
>
> *Penn Central, supra,* 438 U.S. at 124. (Emphasis added)
>
> "[The government] must nonetheless *pay* just compensation. . . ."
>
> *Kaiser Aetna, supra,* 444 U.S. at 180. (Emphasis added)
>
> "Inverse condemnation [is] . . . the manner in which the landowner recovers just compensation for a taking . . . [and] is 'a cause of action against a governmental defendant *to recover the value of the property.* . . .'"
>
> *United States v. Clarke,* ____ U.S. ____, 100 S.Ct. at 1129. (Emphasis added)

Property Owner contends that the Constitution guarantees it, and all other property owners, a remedy of money damages for the taking of its property, whether by regulation or physical seizure, and that anything less, while perhaps socially desirable in the eyes of some, is not "just compensation."

B. Invalidation Is Not "Just Compensation."

A further requirement for "just" compensation according to this Court is that "at the time of the taking" there must be "reasonable, certain and adequate provisions for obtaining compensation." *Regional Rail Reorganization Act Cases,* 419

U.S. 102, 124-125 (1974) quoting from *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); *Bauman v. Ross*, 167 U.S. 548 (1897).

Judged by this standard the alleged remedy provided by the California courts is totally inadequate and cannot be sanctioned by this Court.

The finding of the trial court, twice affirmed by the Court of Appeal, is that Property Owner has been, as of June, 1973, deprived of all beneficial, economic, and practical use of its property by the *course of conduct* of the City.

The supposed "just compensation" offered to Property Owner in 1980, which has been and will continue to be, denied all use of its land, is to "retry the case" seeking mandamus or declaratory relief to "invalidate" the challenged action. The court never addressed the problem of how it was possible to invalidate a course of conduct, but even if it is assumed to be possible, how this would "justly compensate" the property owner whose land was found to have been taken in 1973 - 7 years ago.

The very heart of the concept involved in the Fifth Amendment is to socialize the burden that has been imposed because it is unfair to ask one property owner by himself to bear a burden that should "in all justice and fairness," be borne by the public as a whole. *Armstrong, supra,* 364 U.S. at 49. See also *Willow River, supra,* 324 U.S. at 502. During the period of challenge to the validity of various governmental actions, the individual would have to carry the full weight of a burden which the court has already determined was not his to bear. Property Owner submits this cannot be "just" compensation.

non-compensatory nature of invalidation is particularly true in California, where existing state law (*Selby v. City of San Buenaventura,* 10 Cal.3d 110 (1973)) permits a governmental entity to change the regulation even after trial and judgment, thus allowing the procedure and the challenge "to start all over again."[24]

> "Even where courts do invalidate, . . . invalidation is probably little deterence to excessive regulation. Invalidation is merely a judicial slap on governmental hands. It costs the government nothing except face and the cost of litigating. The court does not even order a particular regulation; it merely invalidates the one that applied. An obdurate government can regulate almost exactly the same again and leave the property owner with another round of exhausting litigation to the relevant highest court, after

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[24] The awareness of this possibility, and thus the possibility for abuse, can be seen by the following comments of the City Attorney of Thousand Oaks, California:

> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent Supreme Court case of *Selby v. City of San Buenaventura,* 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment make it more reasonable, more restrictive, or whatever, and everybody starts over again.'" Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation),* 38B NIMLO Municipal Law Review 175, 192 (1975).

> which the regulation can be modified only slightly again, leading yet to another round."
>
> Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation,* at 293-294 (1978).

Invalidation, through mandamus or declaratory relief, even if it can be attained, is not compensation and cannot be deemed to be the "just" compensation required by the Fifth Amendment to be given when private property has been taken.[25]

CONCLUSION

Prior to 1979, the Fifth Amendment had vitality in California in protecting private property rights from unreasonable restriction by government.

Property Owner herein, faced with oppressive regulatory action, filed a suit in inverse condemnation. After a trial at which all relevant considerations were developed on the record, the trial judge weighed and balanced the competing considerations under the classic formulation uniformly expounded by this Court for decades, and determined that there had been, in fact, a "taking" in the constitutional sense. Money damages were determined and awarded. The Court of Appeal affirmed, finding substantial evidence in the record to support the judgment for money damages.

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[25] With the aim of illustrating the absolute inadequacy of the invalidation remedy, a hypothetical, but unfortunately realistic, scenario of a property owner's experience in Southern California is set forth at Jt. App. 165, Appendix A. Due to its length it is included in the Appendix rather than as a footnote.

Comes 1979 -- enter the California Supreme Court which with a flourish of social experimentation -- in utter disregard of the Fifth Amendment -- and declares that a property owner can *never* recover money damages for a "regulatory" taking.

The Court of Appeal, with understandable deference to the highest state court, was forced to repudiate its previous analysis of the case, recant its previous opinion on the same record, and erase the judgment for money damages.

Property Owner herein now appeals to this Court to urge that this alarming and unconstitutional detour from settled constitutional pathways be halted and the Fifth Amendment revitalized in California.

It is respectfully requested that the decision of the Court of Appeal be vacated and the judgment of the trial court affirmed.

Respectfully submitted,

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